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No.

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1976

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

LOCAL UNION NO. 103, INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL & ORNAMENTAL IRON WORKERS, AFL-CIO, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a-9a) is reported at 535 F. 2d 87. The Board's decision and order (App. D, *infra*, pp. 14a-36a) are reported at 216 NLRB 45.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, pp. 10a-11a) was entered on March 31, 1976, and the Board's timely petitions for rehearing and rehearing *en banc* were denied on June 25, 1976 (App. C, *infra*, pp. 12a-13a). On September 13, 1976, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to and including November 22, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a pre-hire agreement between an employer and a union, entered into pursuant to Section 8(f) of the National Labor Relations Act, privileges recognitional picketing by a minority union which would otherwise violate Section 8(b)(7)(C) of the Act.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*) are as follows:

> Sec. 8. * * * (b) It shall be an unfair labor practice for a labor organization or its agents—
>
> * * * * *
>
> (7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative

> of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:
>
> * * * * *
>
> (C) where such picketing has been conducted without a petition under section 9 (c) being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: *Provided*, That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 9(c)(1) or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: * * *
>
> * * * * *
>
> (f) It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) because (1) the majority status of such labor organization has not been established un-

der the provisions of section 9 of this Act prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: *Provided*, That nothing in this subsection shall set aside the final proviso to section 8(a)(3) of this Act: *Provided further*, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 9(c) or 9(e).

Sec. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *

STATEMENT

In May 1973, Higdon Construction Company executed a contract with Glenmore Distilleries to erect a facility in Owensboro, Kentucky, using union labor. In order to comply with its contract with Glenmore, Higdon Construction sought to employ ironworkers through respondent Union's[1] hiring hall. The Union refused to furnish employees unless Higdon Construction accepted the area-wide labor agreement which had been entered into with a multi-employer association. Higdon Construction attempted at first to use nonunion labor. However, after the Union and other labor organizations struck the Glenmore jobsite, Higdon Construction signed an acceptance of the Union's area-wide agreement on July 31, 1973. The agreement contained no union security clause or dues check-off provision, and was to expire by its terms on March 31, 1976. The agreement professed to cover all employees within the Union's geographic jurisdiction who performed iron work for signatory companies. Higdon Construction complied with the agreement with respect to employees hired for the Glenmore job (App. D, *infra*, pp. 15a, 29a-30a).

In July 1973, Gerald Higdon, the sole owner of Higdon Construction, formed Higdon Contracting Company for the purpose of performing nonunion ironwork jobs.[2] Thereafter Higdon Contracting suc-

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[1] Local 103 of the Iron Workers.

[2] The Board found that Higdon Contracting was the *alter ego* of Higdon Construction, and thus bound by the latter's

cessfully bid on jobs for W.R. Grace Co. and Barmet Industries. After work on those jobs began in early 1974, Higdon Contracting refused the Union's demand that the prior agreement be applied to those jobs as well. In response the Union picketed the jobs with signs stating that Higdon Construction was in violation of its agreement with the Union. Picketing at the Grace jobsite began on January 29, 1974, and continued until March 1, 1974. The Union picketed the Barmet jobsite for five days in March 1974 (App. D, *infra*, pp. 15a-17a, 28a, 30a-31a).

Neither on July 31, 1973, nor at any time thereafter did the Union have, or claim to have, the support of a majority of the employees of Higdon Construction or Higdon Contracting within an appropriate bargaining unit. At the time of the picketing of the Grace and Barmet jobsites the Union was not the certified representative of the Hidgon Contracting or Higdon Construction employees and did not file a petition for an election under Section 9 of the Act (App. D, *infra*, pp. 15a, 17a, 31a).

Upon a charge filed by Higdon Contracting,[3] the Board found that the Union violated Section 8(b)(7)(C) of the Act by picketing for recognition at the Grace jobsite for a period of more than 30 days

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agreement with the Union (App. D, *infra*, p. 20a, n. 7). Higdon Construction and Higdon Contracting are sometimes collectively referred to hereafter as "Higdon".

[3] The General Counsel of the Board refused to issue a complaint on the Union's charge that Higdon had violated Section 8(a)(1), (3), and (5) of the Act (App. D, *infra*, p. 17a).

when it did not represent a majority of Higdon's employees and when a petition for a representation election had not been filed. The Board rejected the Union's contention that the picketing was privileged as a means of enforcing its agreement with Higdon (App. D, *infra*, p. 21a).

The Board found that the agreement between the Union and Higdon was a valid pre-hire agreement under Section 8(f) of the Act. However, the Board noted that, in *R.J. Smith Construction Co.*,[4] it had held that, "although Section 8(f) of the Act clearly exempts a company and union from unfair labor practice liability for entering into a contract prior to establishment of the union as a majority representative, [it] does not protect the union from inquiry into its majority status during the contract term" (App. D, *infra*, pp. 17a-18a). Accordingly, the Board held that "where a union never thereafter obtains majority status, the company does not violate Section 8(a)(5) and (d) of the Act by refusing to continue the bargaining relationship established and by unilaterally changing terms and conditions of employment set forth in the contract" (App. D, *infra*, p. 18a). The Board concluded (*id.* at 20a):

> For the Board to allow the [Union] to picket to enforce an 8(f) agreement if an employer decides to ignore it, as the Employer herein

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[4] 191 NLRB 693, enforcement denied *sub nom. Local 150, Operating Engineers* v. *National Labor Relations Board*, 480 F. 2d 1186 (C.A. D.C.), decision on remand, 208 NLRB 615. See also *Ruttmann Construction Co.*, 191 NLRB 701.

> has done with respect to nonunion jobs, which [the Union] could not enforce by means of obtaining an 8(a)(5) bargaining order, is to permit it to do by indirection what it could not do directly, and in effect nullify our decision in *R.J. Smith* and its progeny that such contracts are voidable by either party if a union never thereafter obtains majority status.

The Board ordered the Union to cease its unlawful recognitional picketing (App. D, *infra*, pp. 22a-23a).

The court of appeals denied enforcement of the Board's order. Adhering to the view of Section 8(f) which it had previously expressed in reversing the Board's decision in *R.J. Smith*,[5] the court stated (App. A, *infra*, pp. 8a-9a):

> [U]nions which are parties to pre-hire agreements have the right to complain of unfair labor practices, including alleged refusals by the employer to bargain collectively, before the union achieves majority. Conversely, an employer who has entered into a validly executed Section 8(f) pre-hire agreement may, after a reasonable period, seek a representation election to challenge an enduring minority union. The Company here could have taken that step but did not. It was the Company, Higdon, which committed an unfair labor practice when, of its own motion, it refused to bargain collectively with the Union.

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[5] *Local 150, Operating Engineers* v. *National Labor Relations Board*, 480 F. 2d 1186 (C.A. D.C.).

REASONS FOR GRANTING THE WRIT

The decision of the court of appeals is contrary to the fundamental principles of the National Labor Relations Act that employees in a bargaining unit are free to select their own bargaining representative and cannot be bound by the terms of an agreement entered into by a labor organization which is not their selected representative. Section 8(b)(7)(C) of the Act was enacted to protect those rights by placing strict limitations on the ability of a union to compel employer recognition of the union by means of picketing and by requiring the union, within a reasonable time, to demonstrate that it has the support of a majority of the employees. By holding that Section 8(b)(7)(C) does not apply to a minority union that is party to a pre-hire agreement authorized by Section 8(f) of the Act, the court of appeals has authorized minority unions coercively to impose contract terms upon employers and employees without ever having to demonstrate majority support in the appropriate unit, and has shifted the burden to the employer to initiate the Board's election process to oust a union that has never even claimed majority support.

The court of appeals in this case has continued to apply an earlier precedent that misconceives the scope of Section 8(f). In light of Section 10(f) of the Act, 29 U.S.C. 160(f), which permits a union always to seek review in the Court of Appeals for the District of Columbia Circuit, the Board is faced with

the prospect of having either to abandon its view of the Act or invite further reversal in that court. In view of the substantial and important questions presented concerning the administration of the Act, review by this Court is warranted.

1. A basic tenet of the Act is that employees shall have the right "to bargain collectively through representatives of their own choosing." Section 7, 29 U.S.C. 157. One of the most important protections of that right is Section 8(b)(7)(C), which was enacted in 1959 and was designed to limit the coercive impact of recognitional picketing by channeling the underlying question of representation into the election procedures of Section 9. As this Court stated in *Connell Construction Co., Inc.* v. *Plumbers & Steamfitters Local 100*, 421 U.S. 616, 632:

> One of the major aims of the 1959 Act was to limit "top-down" organizing campaigns, in which unions used economic weapons to force recognition from an employer regardless of the wishes of his employees. Congress accomplished this goal by enacting § 8(b)(7), which restricts primary recognitional picketing * * *. Construction unions are fully covered by [this section].

Under Section 8(b)(7)(C) it is an unfair labor practice for an uncertified union to engage in recognitional picketing for more than a reasonable period of time, not to exceed 30 days, unless a representation petition is filed with the Board within that time. If a timely petition is filed, Section 8(b)(7)(C) provides for an expedited election, to insure that

the representation question will be promptly resolved by the free choice of a majority of the employees concerned rather than by the ability of the employer and the employees to withstand the adverse economic impact of the picketing. See *International Hod Carriers, Local 840 (Blinne Construction Co.)*, 135 NLRB 1153, 1156-1158; *Dayton Typographical Union No. 57* v. *National Labor Relations Board*, 326 F. 2d 634, 636-638 (C.A. D.C.); *Department & Specialty Store Employees' Local 1265* v. *Brown*, 284 F. 2d 619, 625-627 (C.A. 9), certiorari denied, 366 U.S. 934.

The Union's picketing came squarely within the ban of Section 8(b)(7)(C). The Union has never been certified by the Board as the representative of Higdon's employees. Nor has it ever been selected by a majority of those employees as their representative. Nevertheless, the Union picketed Higdon for more than 30 days, during which time no representation petition was filed. The avowed purpose of the picketing was to compel Higdon to adhere to the pre-hire agreement executed in July 1973 and thus, in effect, to recognize the Union as the bargaining representative of Higdon's employees at the Grace jobsite.[6]

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[6] The Union in its briefs in the court of appeals objected to the Board's characterization of the picketing as "recognitional" and insisted that the picketing was merely to enforce an agreement (Union Br. 7; Union Reply Br. 1). The Union, however, offered no reason to doubt the Board's conclusion that picketing to enforce a union contract constitutes picketing to compel recognition of the union as the employees' bargaining representative, and the court of appeals' opinion clearly assumed the correctness of that conclusion.

2. Section 8(f) of the Act does not create an exception to the limitations on recognitional picketing set forth in Section 8(b)(7)(C). As this Court stated in *Connell Construction Co., Inc., supra*, 421 U.S. at 632, "[c]onstruction unions are fully covered by [Section 8(b)(7)]." Section 8(f) merely provides that it shall not be an unfair labor practice for an employer in the construction industry to make an agreement (commonly called a "pre-hire agreement") with a union covering employees in that history *before* the majority status of the union has been established. Section 8(f) also provides that any such agreement "shall not be a bar" to the filing of a petition by the union, the employer, or a group of employees for an election under Section 9. However, nothing in Section 8(f) provides or suggests that a union that is party to a pre-hire agreement is relieved, until the agreement expires, of the obligation of acquiring majority support or of demonstrating that support before a bargaining obligation, enforceable through Section 8(a)(5), may be imposed upon the employer. Nor does Section 8(f) relieve unions in the construction industry from the restrictions on "top-down" organizing imposed by Section 8(b)(7)(C).

The opinions of the court of appeals in this case and in *Local 150* provide in effect that unions in the construction industry are relieved of those obligations and restrictions. While the court purported to recognize that Section 8(f) "does not wholly obviate the union's need ultimately to achieve majority

status,"[7] the court has held that a union that makes no effort to achieve, or pretense of having achieved, majority support may nevertheless, by unlimited picketing or by obtaining a bargaining order under Section 8(a)(5), enforce a pre-hire agreement for the entire term of the agreement or until the completion of a Board-held election initiated by the employer. Thus the court has in fact obviated the union's need to achieve majority status and has placed the burden on the employer to take steps to establish that the union does not represent a majority of his employees.

3. The court of appeals concluded that the Board's position is inconsistent with Congress' purpose in sanctioning pre-hire agreements in Section 8(f) because the Board would make such agreements "virtually unenforceable".[8] The court further concluded that Congress intended, by the final proviso of Section 8(f), to provide that the only means of challenging a union's lack of majority support in the context of a pre-hire agreement is for the employer to file a petition for a Board election. Those conclusions are erroneous. The Board's position is fully consistent with the purposes of Section 8(f) and constitutes an interpretation of Section 8(f) which is consistent with the fundamental policies of the Act.

The legislative history of Section 8(f) demonstrates that Congress intended by that section to

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[7] *Local 150, supra*, 480 F. 2d at 1190.

[8] *Local 150, supra*, 480 F. 2d at 1190.

create a limited exception for employers and unions in the construction industry from the general rule under the Act that collective bargaining agreements can be concluded only after the union has been selected by the majority of the employees in the unit.[9] The purpose of the exception was explained in the following statement in the report of the Senate Committee on Labor and Public Welfare:

> In the building and construction industry it is customary for employers to enter into collective bargaining agreements for periods of time running into the future, perhaps 1 year or in many instances as much as 3 years. Since the vast majority of building projects are of relatively short duration, such labor agreements necessarily apply to jobs which have not been started and may not even be contemplated. The practice of signing such agreements for future employment is not entirely consistent with Wagner Act rulings of the NLRB that exclusive bargaining contracts can lawfully be concluded only if the union makes its agreement after a representative number of employees have been hired. One reason for this practice is that it is necessary for the employer to know his labor costs before making the estimate upon which his bid will be based. A second reason is that the employer must be able to have available a supply

[9] See *The Lukas-Harold Corp.*, 44 NLRB 730; *Solar Aircraft Co.*, 48 NLRB 242; *Sardik Food Products Corp.*, 46 NLRB 894, 896; *Chicago Freight Car & Parts Co.*, 83 NLRB 1163, 1164-1165. See also the testimony of General Counsel Bott, Hearings on S. 1973 before a Subcommittee of the Senate Committee on Labor and Public Welfare, 82d Cong., 1st Sess. 190 (1951).

> of skilled craftsmen ready for quick referral. A substantial majority of the skilled employees in this industry constitute a pool of such help centered about their appropriate craft union. If the employer relies upon this pool of skilled craftsmen, members of the union, there is no doubt under these circumstances that the union will in fact represent a majority of the employees eventually hired. [S. Rep. No. 187, 86th Cong., 1st Sess. 28 (1959); I Leg. Hist. of the Labor-Management Reporting and Disclosure Act of 1959, 86th Cong., 1st Sess. 424 (G.P.O. 1959), hereafter "Leg. Hist. (1959)".]

Section 8(f) attempted to meet this problem by providing that a pre-hire agreement in the construction industry does not constitute an unfair labor practice.

The legislative history makes clear, however, that Congress did not intend pre-hire agreements automatically to confer representative status on the union or to obviate the union's obligation to acquire majority support. Thus Congress rejected a proposal that would have permitted the Board to certify a union signing a pre-hire agreement as the employees' representative without an election or other proof of majority support but merely upon a showing of a history of bargaining between the union and the employer.[10]

[10] See 105 Cong. Rec. 6431, II Leg. Hist. 1082 (1959) (Senator Goldwater); 105 Cong. Rec. 15541-15542, II Leg. Hist. 1578 (1959) (analysis by Representatives Thompson and Udall).

This proposal would have cloaked the union with representation and bargaining rights for at least a year. See *Brooks v. National Labor Relations Board*, 348 U.S. 96.

Instead Congress provided that the representative status of the union could be challenged at any time. As this Court stated in *Connell Construction Co., Inc., supra*, 421 U.S. at 632:

> The only special consideration given [construction unions] in organizational campaigns is § 8(f), which allows "pre-hire" agreements in the construction industry, but only under careful safeguards preserving workers' rights to decline union representation.

The Board's decision here is consistent with the intent of Congress set forth above. Employers and unions in the construction industry will still be able to conclude pre-hire agreements that will provide the employer with the needed certainty in determining his costs and with a ready supply of skilled employees. As Congress anticipated, in many cases the union will in fact represent a majority of the employees later hired. Moreover, even if the union does not acquire the support of a majority of the employees hired immediately after the commencement of a project, Section 8(b)(7)(C) provides the union with a reasonable period of time to picket to enforce the terms of the agreement. The decision of the Board here is concerned only with those cases in which the union, after a reasonable period of time, is unwilling or unable to demonstrate that it has in fact the support of a majority of the employees in the unit. In those circumstances neither Section 8(f) nor any other provision of the Act permits an agreement to be imposed on employees who have not

assented to it through a bargaining agent of their own choosing.

Nor is the court of appeals' decision justified by its concern that the Board's position makes pre-hire agreements "virtually unenforceable." If the union achieves majority support, the employer and his employees are bound by the agreement.[11] And, in any event, the Board's position does not make pre-hire agreements more "unenforceable" than the decision of the court of appeals. Under the court's decision, a pre-hire agreement becomes unenforceable after a Board election, initiated by the employer's petition, determines that the union lacks majority support. The significant difference between the court's position and the Board's relates to *when* the agreement becomes unenforceable and who has the burden of triggering the determining event.

The court's conclusion that the employer has the burden of initiating procedures to determine the union's lack of majority support in effect accords the union a presumption of representative status that Congress specifically declined to confer in enacting Section 8(f), and is contrary to the basic scheme of the Act, which imposes an affirmative obligation

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[11] If the union can show that, after execution of the pre-hire agreement, it has obtained the support of a majority of the employees, the Board will find that an employer who has repudiated the agreement has violated Section 8(a)(5), and require that it honor the agreement and continue to recognize and bargain with the union. See *National Labor Relations Board* v. *Irvin*, 475 F. 2d 1265, 1270-1271 (C.A. 3), enforcing in relevant part, 194 NLRB 52.

on unions to achieve and demonstrate majority support. Moreover, the court's conclusion that Section 8(f) requires an employer to file an election petition to unseat a minority union is contrary to the plainly permissive language of the proviso to Section 8(f), which states that a pre-hire agreement "shall not be a bar" to the filing of a petition.

Finally, the court's conclusion is contrary to the principles set forth in *Linden Lumber Division* v. *National Labor Relations Board*, 419 U.S. 301. There this Court held that an employer, even when confronted with union authorization cards from a majority of his employees, is not required by the Act to petition for an election and await the results before he may decline to bargain with the union. The Court held that the Act places the burden on the union to establish its majority and rejected the court of appeals' view that Congress, by permitting employers to petition for elections in Section 9, intended to make the filing of a petition the employer's only means of contesting the union's status when confronted with evidence of majority support. As the Court observed, "[l]arge issues ride on who takes the initiative." 419 U.S. at 308. That observation is equally pertinent when, as here, the union does not even claim to represent a majority of the employees. To require employers in those circumstances to abide by a pre-hire agreement until they petition for an election to formalize the union's lack of majority support, is contrary to the Act's fundamental principle that employees shall have the right "to bargain collectively through representatives of their own choosing" (Section 7, 29 U.S.C. 157), and to this Court's admonition that the 1959 amendments to the Act were designed to limit "top-down" organizing practices (*Connell Construction Co., Inc., supra*, 421 U.S. at 632).

5. The court of appeals also expressed concern that the Board's interpretation will lead employers to discourage union membership through "flagrant unfair labor practices" in order to insure that the union never attains a majority. *Local 150, supra*, 480 F. 2d at 1190. However, here, as in *Linden Lumber Division, supra*, there was no evidence of unfair labor practices by the employer. Moreover, the Act contains ample remedies to deter and check employer conduct designed to discourage union membership, including injunctive relief under Section 10 (j), 29 U.S.C. 160(j). In any event, as the Court observed in *Linden Lumber Division, supra*, 419 U.S. at 309, "[t]he Board has at least some expertise in these matters," and the Board's judgment that here, as in other contexts under the Act, the union, not the employer, has the burden of achieving and demonstrating majority support is entirely reasonable. And, of course, the Board's interpretation would remain subject to reconsideration, by the Board or by Congress, in the light of experience with its application and consequences.

6. Since the District of Columbia Circuit has now indicated its adherance to its earlier decision in *Local 150, supra*, despite the Board's continued dis-

agreement with that decision, and since an aggrieved party is always entitled to petition to review a Board order in that Circuit no matter where the unfair labor practice occurred,[12] the Board, as a practical matter, is faced with the choice of either abandoning what it believes to be a correct interpretation of Sections 8(f) and 8(b)(7)(C) or facing further reversal by the District of Columbia Circuit. In these circumstances review of the issue by this Court is warranted.

[12] Section 10(f) of the Act, 29 U.S.C. 160(f), provides, in relevant part:

> (f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ROBERT H. BORK,
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NOVEMBER 1976.

APPENDIX A

COURT'S OPINION

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-1060

LOCAL UNION NO. 103, INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

Petition for Review of Order of
National Labor Relations Board

Argued November 21, 1975

Decided March 31, 1976

Sydney L. Berger, with whom *Charles L. Berger* was on the brief, for petitioner.

Aileen A. Armstrong, Attorney, National Labor Relations Board, with whom *John S. Irving*, Deputy

General Counsel, *Patrick Hardin*, Associate General Counsel, *Elliott Moore*, Deputy Associate General Counsel, and *Robert A. Giannasi*, Assistant General Counsel, National Labor Relations Board, were on the brief, for respondent.

Before: DANAHER, *Senior Circuit Judge*, LEVENTHAL, *Circuit Judge*, and VAN PELT,* *United States Senior District Judge* for the District of Nebraska

Opinion for the Court filed by *Senior Circuit Judge* DANAHER.

DANAHER, *Senior Circuit Judge*: Local Union No. 103 filed its petition stating the issue thus:

> Whether an employer can abrogate unilaterally and breach a validly executed collective bargaining pre-hire agreement merely because the agreement was a pre-hire agreement in the construction industry validly entered into pursuant to Section 8(f) of the National Labor Relations Act.[1]

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* Sitting by designation pursuant to Title 28, U.S. Code § 294(d).

[1] Additionally the Union poses the inquiry:

> Whether the National Labor Relations Board may disregard and refuse to follow this Court's decision in *Local No. 150, International Union of Operating Engineers, AFL-CIO* v. *National Labor Relations Board*, 156 U.S.App.D.C. 294, 480 F.2d 1186 (1973).

In that case we noted that two members of the Board had dissented. We concluded that the Board's order had been premised upon an erroneous construction of the Act where

The Board by way of counterstatement suggests that we consider:

> Whether the Board properly found that the Union violated Section 8(b)(7)(C) of the Act by conducting recognitional picketing at the Company's job-sites for more than 30 days without filing a representational petition.

It is clear enough that the Board was—and is—unhappy with this court's opinion in *Local No. 150* v. *National Labor Relations Board*, footnote 1, *supra*. Although the Board had never appealed, nor did it seek rehearing *en banc*, it now asks us to reconsider and overrule our *Local 150* decision.

BACKGROUND

The Board in its Decision and Order noted that the material facts are essentially undisputed, with Higdon Construction Company, an employer engaged primarily in the building and construction industry within Section 8(f) of the Act, and Local 103, by the same token, a labor organization of building and

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the Board had held that R. J. Smith Construction Company, Inc., had not violated the Act when it unilaterally changed existing wage rates at a time when it had a pre-hire contract with the Union. In the instant case, the Administrative Law Judge (ALJ) concluded that the Board should dismiss the complaint against the Union, but after the General Counsel had filed exceptions to the decision of the ALJ, the case was submitted to a three-member panel of the Board which overruled the ALJ and found the Union guilty of an unfair labor practice by its picketing.

construction employees. Higdon Construction Company (herein Higdon Construction) and the Local had had a collective-bargaining relationship since 1968. Their initial contract which expired in December 1972 had been negotiated under Section 8(f).

In July 1973 Higdon Construction was engaged in the the performance of a construction contract at Glenmore Distillery. Local 103 refused to furnish employees unless Higdon Construction were to execute a contract. After the job had twice been shut down, Higdon Construction on July 31, 1973, signed an acceptance of agreement covering Local 103 Ironworkers. Higdon Construction agreed to abide by an existing agreement, which by its terms expires on March 31, 1976, between Tri-State Iron Workers Employers Association, Inc. and Local 103.[2]

The Union did not then or thereafter represent or claim to represent a majority of Higdon Construction's employees. Some employees were supplied by the Union at the Glenmore site, and wages and con-

[2] That contract contains no union-security clause and no checkoff provisions. We attach no significance to that fact despite a contrary view submitted by Board counsel at oral argument. The point had not been discussed in the Board's opinion nor asserted as a controlling factor. Obviously, we can affirm only on grounds which would comport with the Court's rulings in *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947) and *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 168-69 (1962).

We do not accept the Board's thus restated repudiation of *Local No. 150, supra*, note 1, where we specifically ruled contrary to the Board's position. *See* 156 U.S. App. D.C. at 298 & n.7, 480 F.2d at 1190 & n.7.

tributions to the welfare fund were paid for them in accordance with the contract.

Gerald J. Higdon [3] in July 1973 caused to be created the Higdon Contracting Company (hereinafter, Higdon Contracting) which had bid successfully on nonunion iron work of W. R. Grace Co. at Owensboro, Kentucky, and of Barmet Industries, Inc. at Rockport, Indiana. Higdon *Contracting* was the charging party in the proceedings under consideration.

In January 1974 after construction was commenced at the W. R. Grace jobsite, the Union began, and from time to time thereafter until March 1974 continued, to picket with picket signs carrying the legend:

[3] The Board in its opinion tells us:

> Gerald J. Higdon is the sole stockowner of both Higdon Contracting and Higdon Construction and the president of both companies. His son is secretary-treasurer of both companies. The directors are the same. Higdon Construction, which owns all the equipment, leases the equipment to Higdon Contracting. Trucks used by Higdon Contracting on the Grace jobsite, discussed *infra*, bear the name of Higdon Construction. In addition, an invoice dated March 8, 1974, indicates that material worth $96,788, for a building on the Rockport, Indiana, site, discussed *infra*, was charged to Higdon Construction. Higdon testified that Higdon Construction is the "only one that has any par value at all" and "it's one and the same companies. . . ."

The Board found that Higdon Construction and Higdon Contracting were actually a single integrated employer, and herein we may refer to the Company simply as Higdon, or occasionally as the Company.

> Higdon Construction Company is in violation of the agreement of the Iron Workers Local No. 103.

Although Higdon could have filed a petition seeking an election, it did not do so, and neither did Local 103. Instead, it seemed clear enough to the Administrative Law Judge, that Higdon had sought to proceed at the Grace jobsite with nonunion labor and in disregard of the pre-hire agreement with the Local. The Board noted that when the Local's business representative sought to sign up the Company, Gerald J. Higdon took the position that so to act "would defeat the purpose I had started out to do . . .". The Board in its Decision and Order specifically recognized that Higdon Contracting had been formed in July 1973 to perform nonunion ironwork jobs.

So it was that the Local commenced its picketing at the Grace jobsite on January 29, 1974, and continued off and on until March 1, 1974. A similar situation developed at the Barmet jobsite about February 20, 1974, and continued on various days up to March 20, 1974. In both locations the picket signs read as above set out.

Rejecting the views of the ALJ, the Board concluded that the Local's picketing had for its object the forcing of the Company to bargain with it without being currently certified and without having filed a petition for an election within a reasonable period of time. The Board's order directed the Local to cease and desist from picketing as a means of

forcing or requiring the Company to recognize or bargain with the Local as the representative of its employees in violation of Section 8(b)(7)(C) of the Act.

I

The Board's Decision and Order here reverted to its own position in *Local No. 150*, *supra* note 1, involving *R. J. Smith Construction Co., Inc.*, 191 NLRB 693 (1971). The Board there had ruled that Section 8(f) does not protect the Union from inquiry into its majority status during the contract term. The Board here went on to reaffirm its previous holding, despite our opinion in *Local No. 150*, even as it noted as undisputed, that the instant July 31, 1973, contract was a "prehire agreement lawfully executed under Section 8(f) of the Act prior to the establishment of the Respondent's majority status."

The Board declined to accept the appraisal by the ALJ who sought to give effect to this court's ruling in *Local No. 150*. The Board read the record here as containing evidence

> that the Employer sought to adhere to the contract for union work, such as the Glenmore contract, and to avoid it as to nonunion work by the creation of a second corporation.

Correctly identifying the position taken by the ALJ that the picket legend had published the truth, the Board continued:

> . . . He found that the target of Respondent's picketing was not to force or require the Em-

ployer to initially accept the Union as the bargaining representative since that had already been accomplished, but instead was to secure compliance with an existing contract, a permissible objective. We disagree.

II

No substantial advantage will be achieved by further analysis of the details of the Board's effort here to justify its rejection of the holding of this court in *Local No. 150, (R. J. Smith)*, or the post-hoc efforts of the Board's appellate counsel to distinguish the instant case. Rather, we may simply and summarily demonstrate the adamant position of the Board by setting forth *its own* explanation thus:

> For the Board to allow the Respondent to picket to enforce an 8(f) agreement if an employer decides to ignore it, as the Employer herein has done with respect to nonunion jobs, which Respondent could not enforce by means of obtaining an 8(a)(5) bargaining order, is to permit it to do by indirection what it could not do directly and in effect nullify our decisions in *R. J. Smith* and its progeny that such contracts are voidable by either party if a union never thereafter obtains majority status. In these circumstances, we conclude that the picketing by Respondent to enforce a noneffective 8(f) contract was for initial recognitional purposes and therefore was proscribed by Section 8(b)(7)(C) of the Act.

It is our view that unions which are parties to prehire agreements have the right to complain of unfair labor practices, including alleged refusals by the em-

ployer to bargain collectively, before the union achieves a majority.[4] Conversely, an employer who has entered into a validly executed Section 8(f) prehire agreement may, after a reasonable period, seek a representation election to challenge an enduring minority union. The Company here could have taken that step but did not. It was the Company, Higdon, which committed an unfair labor practice when, of its own motion, it refused to bargain collectively with the Union. The principles so stated are applicable here and must control. *See Local No. 150* v. *N.L.R.B.*, *supra* note 1, 156 U.S. App. D.C. at 298, 299, 480 F.2d at 1190, 1191.

Reversed and remanded.

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[4] Board counsel in the Board's brief and at oral argument raised the possibility, nowhere adverted to in the Board's order, whether by way of reliance or otherwise, that this case is *a fortiori* controlled by *Dayton Typographical Union No. 57* v. *N.L.R.B.*, 117 U.S. App. D.C. 91, 326 F.2d 634 (1963).

Congress earlier had recognized that what could become an unfair labor practice in employer-employee situations in general was not so to be seen respecting the *construction industry* where building projects are of relatively short duration and where labor agreements of the usual type could not practically be given application. We noted as much in *Local No. 150* v. *N.L.R.B.*, *supra* note 1.

The union here is engaged in the construction industry and had been picketing to secure compliance with an existing contract valid under Section 8(f); the Typographical Union in *Dayton* was simply an uncertified but concededly majority union picketing to compel employer recognition. Here the Board summarily dismissed the Section 8(a)(5) charge which had been filed by Local 103. This action alone failed to conform to the thinking in *Dayton*, *cf.* the legislative history *generally*, and the discussion in *Dayton*, *supra*, 117 U.S. App. D.C. at 104, *et seq.*, 326 F.2d at 647, *et seq.*

APPENDIX B

JUDGMENT

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1975

[Filed Mar. 31, 1976, United States Court of Appeals for the District of Columbia Circuit, George A. Fisher, Clerk]

No. 75-1060

LOCAL UNION NO. 103, INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

PETITION FOR REVIEW OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Before: DANAHER, Senior Circuit Judge, LEVENTHAL, Circuit Judge and VAN PELT,* United States Senior District Judge for the District of Nebraska

JUDGMENT

This cause came on to be heard on a petition for review of an order of the National Labor Relations

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* Sitting by designation pursuant to 28 U.S.C. § 294(d).

Board and was argued by counsel. On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this Court that the order of the National Labor Relations Board on review herein is hereby reversed and this case is hereby remanded to the Board, in accordance with the opinion of this Court filed herein this date.

Per Curiam
For the Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Date: March 31, 1976

Opinion for the Court filed by Senior Circuit Judge Danaher.

A true copy:

Test: George A. Fisher
United States Court of Appeals for
the District of Columbia Circuit

By: /s/ Mary Mattingly,
Deputy Clerk

APPENDIX C

ORDER ON REHEARING

J-7996A

Local Union No. 103, Int'l Assn. of Bridge,
Structural & Ornamental Iron Wkrs., AFL-CIO
(Higdon Contracting Co., Inc.)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1975

[Filed Jun. 25, 1976, United States Court of Appeals
For the District of Columbia Circuit
George A. Fisher, Clerk]

No. 75-1060

LOCAL UNION NO. 103, INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT
HIGDON CONTRACTING CO., INTERVENOR

Before: Bazelon, Chief Judge; Wright, McGowan, Tamm, Leventhal, Robinson, MacKinnon, Robb and Wilkey, Circuit Judges.

ORDER

The brief of Higdon Contracting Company, Inc., an intervenor herein, which among other things suggests a hearing *en banc* and the granting of oral argument, and the suggestion for rehearing *en banc* filed by the respondent National Labor Relations Board, having been transmitted to the full Court and there not being a majority of the Judges in regular active service in favor of having this case reheard *en banc*, it is

ORDERED by the Court *en banc* that the suggestions for hearing and for rehearing *en banc* are denied.

Per Curiam
For the Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

APPENDIX D

DECISION AND ORDER

Local Union No. 103, International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO[1] *and* Higdon Contracting Company, Inc. Case 25-CP-63-2

January 6, 1975

By Members Jenkins, Kennedy, and Penello

On August 23, 1974, Administrative Law Judge Lowell Goerlich issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief and the Respondent filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge only to the extent consistent herewith.

The material facts are essentially undisputed. Higdon Construction Company has been an employer engaged primarily in the building and construction industry within the meaning of Section 8(f) of the Act, and Local 103 has been a labor organization of which building and construction employees are members within the meaning of Section 8(f). Higdon Construction Company, herein called Higdon Construction, and Respondent have had a collective-bargaining relationship since 1968. Their initial contract which expired about December 1972, had been negotiated under Section 8(f) of the Act. In July 1973, Higdon Construction was engaged in the performance of a construction contract at Glenmore Distillery. Local 103 refused to furnish employees unless Higdon Construction executed a contract, and together with Carpenters and Operating Engineers shut down the job twice. Whereupon, Higdon Construction on July 31, 1973, signed an acceptance of agreement covering Respondent's ironworkers by which Higdon Construction agreed to abide by an existing agreement between the Tri-State Iron Workers Employers Association, Inc., and Local 103, which by its terms expires on March 31, 1976. The contract does not contain a union-security clause or any checkoff provisions. Neither at the time the contract was executed nor thereafter did the Union claim to, or in fact, represent a majority of Higdon Construction's employees. The record indicates that some employees were supplied by the Union on the Glenmore job and wages and contributions to the welfare fund were paid for them according to the contract.

Higdon Contracting Company, the Charging Party, herein called Higdon Contracting, was formed in July 1973 to perform nonunion ironwork jobs.[2] It

[1] Herein called Local 103 or Respondent.

[2] Gerald J. Higdon is the sole stockowner of both Higdon Contracting and Higdon Construction and the president of

successfully bid on jobs of W. R. Grace Co. at Owensboro, Kentucky, and of Barmet at Rockport, Indiana. About January 1, 1974, shortly after construction at the W. R. Grace jobsite began, Local 103 Business Representative William Oglesby and Carpenters Representative Mosely talked to Higdon Contracting's general manager, Philip C. Kelly, and told him that Higdon Construction was in violation of its contract at the Grace jobsite. Thereafter, in February 1974, Oglesby asked Higdon "what was going on" at the Grace jobsite. Higdon replied that the reason the job was being handled under the new company's name was because Higdon had been forced into signing the contract at Glenmore, and Higdon had a lot of nonunion competition. When Ogelsby attempted to "get [him] signed up," Higdon responded that "this would be kind of silly for me to do this because it would defeat the purpose I had started out to do. . . ." Higdon admitted "it's one and the same companies . . . under one hat or another hat, depending on whether [he was] doing Union work or non-union work. . . ."

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both companies. His son is secretary-treasurer of both companies. The directors are the same. Higdon Construction, which owns all the equipment, leases the equipment to Higdon Contracting. Trucks used by Higdon Contracting on the Grace jobsite, discussed *infra*, bear the name of Higdon Construction. In addition, an invoice dated March 8, 1974, indicates that material worth $96,783, for a building on the Rockport, Indiana, site, discussed *infra*, was charged to Higdon Construction. Higdon testified that Higdon Construction is the "only one that has any par value at all" and "it's one and the same companies. . . ."

Local 103 caused pickets to be placed at the Grace jobsite on Jauary 29, 1974. Pickets remained at the site, except during periods of inclement weather (about 4 or 5 days) until March 1, 1974. The picket sign carried the following inscription:

> Hidgon Construction Company is in violation of the agreement of the Iron Workers Local Number 103

Higdon Contracting started the Barmet job on or about February 20, 1974. Within the first few days, Local 103 Business Agent Hill asked Kelly if "we" were going to use union people on the job. Kelly told him that Higdon Contracting was doing the job; it did not have a contract with the Ironworkers, and was not going to do the job as a union contractor. Hill said, "I'll get right on it." Thereafter, Local 103 picketed this job on March 4, 5, 18, 19, and 20, 1974, with the same signs described above.

Local 103 has not filed a petition seeking an election, nor has Higdon Contracting or Higdon Construction. Nor has Local 103 filed an 8(a)(2) charge. It did file charges alleging violation of Section 8(a)(1), (3), and (5), which were dismissed April 25, 1974.

In *R. J. Smith Construction Co., Inc.*,[3] the Board found that, although Section 8(f) of the Act clearly exempts a company and union from unfair labor practice liability for entering into a contract prior to

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[3] 191 NLRB 693 (1971), enforcement denied *sub nom. Local No. 150, Operating Engineers* v. *N.L.R.B.*, 480 F.2d 1186 (C.A.D.C., 1973), remand accepted 208 NLRB 615 (1974).

establishment of the union as a majority representative, Section 8(f) does not protect the union from inquiry into its majority status during the contract term. The Board thus concluded that Section 8(f) only protects from illegality the preliminary contractual steps of a prehire agreement, and that, where a union never thereafter obtains majority status, the company does not violate Section 8(a)(5) and (d) of the Act by refusing to continue the bargaining relationship established and by unilaterally changing terms and conditions of employment set forth in the contract. Since the Board found that the union had admittedly never attained majority status, it dismissed the refusal-to-bargain complaint.

As set out above, it is undisputed that the Union did not represent a majority of either the employees of Higdon Construction or of Higdon Contracting at any relevant time. Nor is it disputed that the parties' July 31, 1973, contract was a prehire agreement lawfully executed under Section 8(f) of the Act prior to the establishment of the Respondent's majority status. The Administrative Law Judge sought to distinguish this case from *R. J. Smith, supra*, on the ground that there is no persuasive evidence that the Employer actively repudiated the contract. Rather the evidence is that the Employer sought to adhere to the contract for union work, such as the Glenmore contract, and to avoid it as to nonunion work by the creation of a second corporation. The Administrative Law Judge therefore concluded that the picket legend published the truth. He found that the target

of Respondent's picketing was not to force or require the Employer to initially accept the Union as the bargaining representative since that had already been accomplished, but instead was to secure compliance with an existing contract, a permissible objective. We disagree.

In *Ruttmann Construction Company*,[4] a companion case to *R. J. Smith, supra*, the Board stated that the "prehire agreement is merely a preliminary step that contemplates further action for the development of a full bargaining relationship: such actions may include the execution of a supplemental agreement for certain projects or covering a certain area and the hiring of employees who are usually referred by the union or unions with whom there is a prehire agreement." Thus, the Board recognized the industrial realities of the construction industry in finding that 8(f) contracts do not carry, even with union-security provisions, a presumption of majority status until such time as employees for particular projects have been hired.[5] In *David F. Irvin, et al., d/b/a The Irvin-McKelvy Company*,[6] the parties conceded, and the Board held, that by virtue of compliance with union-security provisions in an 8(f) contract the union had majority status at those projects still underway. The Board nevertheless dismissed the complaint

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[4] 191 NLRB 701, 702 (1971).

[5] More precisely until the provisions of the union-security clause have taken effect at a project (usually 7 days).

[6] 194 NLRB 52 (1971), enforcement granted in part and denied in part 475 F.2d 1265 (C.A. 3, 1973).

therein with respect to projects not yet begun at the time the employer terminated the union contract.

From the foregoing, we conclude that the contract herein is an 8(f) contract and that no presumption of majority status attaches to it in the circumstances of this case. Accordingly, the duty of Higdon Construction and its *alter ego*, Higdon Contracting,[1] to honor the Employer's collective-bargaining agreement with Local 103 is limited by the nature of 8(f) agreements. Under the doctrine set out in the cases cited above, the Employer could have terminated the agreement with Local 103 for projects not yet underway. For the Board to allow the Respondent to picket to enforce an 8(f) agreement if an employer decides to ignore it, as the Employer herein has done with respect to nonunion jobs, which Respondent could not enforce by means of obtaining an 8(a)(5) bargaining order, is to permit it to do by indirection what it could no do directly, and in effect nullify our decisions in *R. J. Smith* and its progeny that such contracts are voidable by either party if a union never thereafter obtains majority status. In these circumstances, we conclude that the picketing by Respondent to enforce a noneffective 8(f) contract was for

[1] The Administrative Law Judge found that Higdon Contracting was the *alter ego* of Higdon Construction, and the General Counsel did not except to this finding. Thus, Higdon Contracting was bound by the collective-bargaining contract of Higdon Construction and Respondent. *See Peter Kiewit Sons' Co. and South Prairie Construction Co.*, 206 NLRB 562 (1973).

initial recognitional purposes and therefore was proscribed by Section 8(b)(7)(C) of the Act.

THE REMEDY

Having found that Respondent engaged in certain unfair labor practices, we shall order that it cease and desist therefrom and take certain affirmative action set forth below to effectuate the policies of the Act.

CONCLUSIONS OF LAW

1. Higdon Contracting Company, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Respondent is a labor organization within the meaning of Section 2(5) of the Act.

3. By picketing Higdon Contracting Company, Inc., from January 29, 1974, until March 1, 1974, at its W. R. Grace Company jobsite at Owensboro, Kentucky, with an object of forcing and requiring Higdon Contracting Company, Inc., to bargain with Respondent, without being currently certified as the representative of Higdon Contracting Company, Inc.'s employees and without a petition under Section 9(c) being filed within a reasonable period of time, Respondent engaged in unfair labor practices within the meaning of Section 8(b)(7)(C) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Local Union No. 103, International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO, Evansville, Indiana, its officers, agents, and representatives, shall:

1. Cease and desist from picketing or causing to be picketed, or threatening to picket or cause to be picketed, Higdon Contracting Company, Inc., where an object thereof is forcing or requiring said employer to recognize or bargain with it as the representative of its employees in violation of Section 8 (b) (7) (C) of the Act.

2. Take the following affirmative action designed to effectuate the purposes of the Act:

(a) Post at its business offices and meeting halls copies of the attached notice marked "Appendix."* Copies of said notice, on forms provided by the Regional Director for Region 25, after being duly signed by the Respondent's authorized representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days there-

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* In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

after, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by it to insure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director for Region 25, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

APPENDIX

Notice To Employees
Posted by Order of the
National Labor Relations Board

An Agency of the United States Government
After a trial in which all parties had the opportunity to present their evidence, it has been decided that we violated the law by picketing or causing to be picketed, or threatening to picket or causing to be picketed Higdon Contracting Company, Inc., where an object thereof was to force or require the said Employer to recognize or bargain with us as the representative of its employees in violation of Section 8(b)(7)(C) of the Act. We have been ordered to post this notice. We intend to carry out the Order of the Board and abide by the following:

> WE WILL NOT, under conditions prohibited by Section 8(b)(7)(C) of the Act, picket or cause to be picketed, or threaten to picket or cause to be picketed, Higdon Contracting Company, Inc., where an object thereof is to force or require the said Employer to recognize or bargain with us as the representative of its employees.

LOCAL UNION NO. 103,
INTERNATIONAL
ASSOCIATION OF BRIDGE,
STRUCTURAL AND
ORNAMENTAL IRON
WORKERS, AFL-CIO

DECISION

Statement of the Case

LOWELL GOERLICH, Administrative Law Judge: The charge filed by Higdon Contracting Company, Inc., herein referred to as Higdon Contracting, against Local Union No. 103, International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO, the Respondent herein, sometimes referred to as the Union, on March 6, 1974, was served on the Respondent by registered mail on or about March 6, 1974. A complaint and notice of hearing was issued on April 25, 1974. The complaint charged that the Respondent violated Section 8(b)(7)(C) of the National Labor Relations Act, as amended, herein referred to as the Act, in that the Respondent picketed certain jobsites, with the object of forcing and requiring Higdon Contracting to recognize the Respondent as the collective-bargaining representative of its employees and the employees of Higdon Contracting to accept the Respondent as their collective-bargaining representative when at the time of said picketing the Respondent was not certified as the bargaining representative of the employees of Higdon Contracting nor had the Respondent filed a valid petition under Section 9(c) of the Act within a reasonable time from the commencement of such picketing.

The Respondent filed a timely answer denying that it had engaged in any of the unfair labor practices alleged.

The case was submitted pursuant to the following stipulation:

> The [parties hereto] hereby agree as follows:
>
> 1. All parties hereby waive all rights to the holding of a hearing before an Administrative Law Judge.
>
> 2. The case shall be submitted to an Administrative Law Judge for decision and issuance of decision, and the following shall constitute the record in this case, copies of which are attached hereto and made a part hereof:
>
> a. The complaint, marked Attachment A, which was timely served on all parties.
> b. The answer, marked Attachment B, which was timely served on all parties.
> c. The order postponing the hearing, marked Attachment C, which was timely served on all the parties.
> d. The order indefinitely postponing the hearing, marked Attachment D, which was timely served on all parties.
> e. The transcript (including the exhibits) of a hearing before District Judge Gordon on May 6, 1974, concerning the above case, marked Attachment E. [The parties hereto agree that references in the transcript to "VII" should read "8."]
> f. The petition for injunction in Civil No. C74-420, marked Attachment F.
>
> 3. The parties do not necessarily concede the relevance of all facts above recited, and any party urging irrelevance will do in a brief to the Administrative Law Judge.

> 4. The privilege of filing a brief to the Administrative Law Judge is expressly reserved by all parties hereto, said briefs to be due by a date to be set by the Administrative Law Judge.

All briefs have been carefully considered.

Findings of Fact, Conclusions, and Reasons Therefor

I. The business of the charging party

Higdon Contracting is, and has been at all times material herein, a corporation duly organized under, and existing by virtue of, the laws of the State of Kentucky.

At all times material herein, Higdon Contracting has maintained its principal office and place of business at Owensboro, Kentucky, herein called the facility, and various other facilities and jobsites in the States of Kentucky and Indiana, and is, and has been at all times material herein, engaged at said facilities and jobsites as a general contractor in the construction contracting industry.

During the past year, a representative period, Higdon Contracting in the course and conduct of its business operations purchased, transferred, and delivered to its Kentucky facilities and jobsites goods and materials valued in excess of $50,000 which were transported to said facilities and jobsites directly from States other than the State of Kentucky.

During the past year, a representative period, Higdon Contracting in the course and conduct of its

business operations performed services valued in excess of $50,000 in States other than Kentucky wherein Higdon Contracting is located.

Higdon Contracting is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Respondent is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The Facts*

The Union caused pickets to be placed at the W. R. Grace Chemical jobsite in Owensboro, Kentucky, where the Higdon Contracting was performing construction work on January 29, 1974. Pickets remained at the site, except during periods of inclement weather (about 4 or 5 days), until March 1, 1974. The picket sign carried bore the legend:

> Higdon Construction Company is in violation of the agreement of the Iron Workers Local Number 103

The Union also picketed with a similar sign on March 4, 5, 18, 19, and 20, 1974, at the Barmet jobsite at Rockport, Indiana, where Higdon Contracting was also performing work.

On July 7, 1973, the Higdon Construction Company, herein referred to as Higdon Construction, recognized the Union and accepted and approved the current labor agreement between the Tri-State Iron Workers Employees Association, Inc., and the International Association of Bridge, Structural and Ornamental Iron Workers, Local 103, terminating on March 31, 1976. The agreement was signed by Gerald J. Higdon for Higdon Construction. At the time this agreement was signed Higdon Construction had executed a construction contract dated May 7, 1973, calling for construction work at the Glenmore Distilleries Company in Owensboro, Kentucky. An article of the contract provided:

> It is understood and agreed as a material part and as a consideration for this contract that Contractor [Higdon Construction Company, Inc.] as well as any sub-contractor or assignee hereunder, shall use union labor exclusively in the performance of this contract.

Higdon maintained that he entered into the labor agreement with the Union "reluctantly, against my will." He explained that in order to comply with his agreement with Glenmore Distilleries Company he had asked for employees through the Union. The Union refused to furnish employees. Nevertheless, when Higdon determined to continue without union labor, the Carpenters and Operating Engineers "entered into it." Said Higdon: "They came up and shut my job down and there was talk about a walk out of the Distillery. So, their manager came to me

and told me that something would have to be done. Well, when the final shut down came, uh, well, I—I just lost my cool and I went and signed their contracts." The contract does not contain a union-security clause or any checkoff provisions.

Thereafter in July 1973 Higdon incorporated the Higdon Contracting Company, Inc., the Charging Party herein. Higdon is the sole stockowner of both Higdon Contracting and Higdon Construction and the president of both companies. His son is secretary-treasurer of both companies. The directors are the same. Equipment is being leased from one company to the other.[1] Trucks used by Hidgon Contracting on the Grace Company jobsite bear the name of Higdon Construction. Indeed an invoice dated 3/8/74 reveals that material for a building in the amount of $96,788 intended for the Rockport, Indiana, site was charged to Higdon Construction.

In February 1974 when Union Representative William Oglesby asked Higdon "what was going on" at the Grace Company site, Higdon replied that a new company had been set up. He continued, "they had, uh, forced me into signing this agreement at the Glenmore Distillery that I had to do something because, uh, I have a lot of competition that is not non-union. . . ." When Oglesby attempted to "sign-up" the new company Higdon responded that "this would

[1] Higdon testified, "Well Higdon Construction Company is the only one that has any par value at all and, uh, therefore it would own the equipment, once it is paid for and, uh, we lease it to the Higdon Contracting Company."

be kind of silly for me to do this because it would defeat the purpose I had started out to do . . . ." Higdon frankly admitted "it's one and the same companies . . . under one hat or another hat, depending on whether [he was] doing Union work or non-union work . . . ."[2]

After Hidgon refused to honor the above-mentioned labor agreement the Union placed the pickets as above detailed.

Neither at the time the contract was executed nor thereafter did the Union represent a majority of the employer's employees within an appropriate unit.

B. *Conclusions and Reasons Therefor*

The contract executed by Higdon Construction and the Union on July 7, 1973, satisfied the lawful requirements for a prehire agreement authorized by Section 8(f) of the Act.[3] Nevertheless, the General Counsel apparently asserts, as his major premise,

[2] When Higdon informed Union Representative Oglesby that Higdon Construction did not have a contract with W. R. Grace Company, according to Higdon, Oglesby said that "we were in violation of contract and that we should get a lawyer because we would have to go to court with 'em."

[3] The employer was "engaged primarily in the building and construction industry"; the employees covered by the agreement were "engaged (or who, upon their employment, [would] be engaged) in the building and construction industry"; and the union was "a labor organization of which building and construction employees [were] members (not established, maintained, or assisted by any action defined in section 8(a) of [the] Act as an unfair labor practice. . . ."

that the contract, "an 8(f) agreement," had no prospective validity requiring the employer to adhere to its terms because at no time after it was executed did the Union represent a majority of the employer's employees in an appropriate unit. Thus, reasons the General Counsel, it follows that, in the absence of a valid contract, the Union's picketing aimed at the employer's violation of a noneffective contract was for initial recognitional purposes proscribed by Section 8(b)(7)(C). The General Counsel's major premise is drawn from the Board's holding in *R. J. Smith Construction Co., Inc.*, 191 NLRB 693 (1971). In this case a majority of the Board held "that a prehire agreement, although validly executed for a fixed term of years, is effective only so long as both parties wish to adhere to it and may be ignored with impunity . . . by either party at any time without thereby offending either Section 8(a)(5) or Section 8(b)(3) of the Act" [4] if the Union has not previously established a majority.[5] The facts in that case

[4] This language is taken from the dissent.

[5] This proposition of law was reversed by the Court of Appeals for the District of Columbia, 480 F.2d 1186 (1973). The court held that "an employer, who has entered into a validly executed prehire agreement may, after a reasonable period, seek a representation election to challenge an enduring minority union, but until he does and prevails, he should be held to the same standard of conduct in regard to unfair labor practices as an employer who has entered into a collective-bargaining agreement with a union certified to have majority status." On remand, 208 NLRB 615 (1974), the Board applied the court's views. In a footnote it was noted, "Member Fanning agrees with the court's decision. Chairman Miller

disclose that the employer, while he executed 8(f) agreements, did not intend and never did abide by their terms. Moreover, during the period of the agreements, without prior notice or bargaining with the union, the employer raised wages of certain employees covered by the agreement.

The facts in the instant case differ. Here the terms of the contract were implemented. Employees were supplied by the union and wages and contributions to the welfare fund were paid according to the contract. There is no persuasive evidence that the Employer actually repudiated the contract. On the other hand, the evidence is that the Employer sought to adhere to the contract for union work (such as the Glenmore Distilleries contract) and to avoid it as to nonunion work by the creation of a second corporation as a subterfuge and a sham. This blow hot, blow cold stance of the Employer,[6] which contem-

reserves opinion as to the underlying legal issues. . . ." While I adhere to the reasoning of the court and the dissent, I deem myself bound by the Board's decision. *Insurance Agents' International Union, AFL-CIO*, 119 NLRB 768, 772-773 (1958).

[6] The record indicates that Higdon was the real employer, the alter ego of Higdon Construction and Higdon Contracting, a single integrated business entity. See *J. Howard Jenks, d/b/a Glendora Plumbing*, 165 NLRB 101 (1967); and *Industrial Fabricating Inc.*, 119 NLRB 162 (1957). Higdon admitted that Higdon Contracting and Higdon Construction were "one and the same."

In *Bricklayers, Masons and Plasterers' Union, Local No. 1*, 209 NLRB 820 (1974), it was stated by the Administrative Law Judge:

[Footnote continued on page 34a]

plated an adherence to the contract for some purposes, was not of such character as to render the Union's picket line vulnerable to Section 8(b)(7)(C).[7] Not all picketing which continues for more

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[6] [Continued]

Where an individual is the sole owner of a corporation, the Board has consistently ignored the corporate fiction and has considered one as the alter ego of the other. *Diaper Jean Manufacturing Company*, 109 NLRB 1045 (1954); *Industrial Fabricating Inc.*, 119 NLRB 162, 169 (1957), enfd. 272 F.2d 184 (C.A. 6, 1959); *Ogle Protection Service, Inc. and James L. Ogle*, 149 NLRB 545, 546 (1964), fn. 1, modified in other respects 375 F.2d 497 (C.A. 6, 1967).

[7] Sec. 8(b)(7)(C) reads as follows:

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

* * * *

(C) where such picketing has been conducted without a petition under section 9(c) being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: *Provided*, That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 9(c)(1) or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: *Provided further*, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

than 30 days without filing a representation petition runs afoul of Section 8(b)(7)(C). *Local Union No. 741, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO*, 137 NLRB 1125 (1962). Only picketing is banned where an object of such picketing is to require an employer to "recognize or bargain" with a labor organization or to require the employees "to select such labor organization as their collective bargaining representative." In the instant case the object of the picketing as indicated by the picket sign was to inform the world that the Employer was in violation of an agreement with the Union. Since there is no persuasive evidence that the Employer, who had recognized the Union, intended to terminate the contract *in toto* but only sought by subterfuge and chicanery to avoid its application for nonunion work[8] while adhering to the contract for union work, the picket legend published the truth. The target of the Union's picketing was not to force or require the Employer to initially accept the Union as the bargaining representative, since that had already been accomplished, but to se-

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[8] Higdon testified, "in order to, uh, get around the contract, as you put it, uh, to be able to bid with my competition, yes."

cure compliance with an existing contract, a permissible objective.

In *Bay Counties District Council of Carpenters, AFL-CIO, et al.*, 154 NLRB 1598, 1605 (1965) the Board said:

> We have held in previous cases that Section 8(b)(7)(C) is not to be literally applied so as, for example, to reach picketing by a recognized union to secure compliance with an existing contract, since the section was
>
> > intended to proscribe picketing having as its target forcing or requiring an employer's *initial* acceptance of the union as the bargaining representative of his employees. [Emphasis supplied.]

(Citing *Building and Construction Trades Council of Santa Barbara County, AFL-CIO, et al. (Sullivan Electric Company)*, 146 NLRB 1086, 1087 (1964).) Thus, the Union's picketing did not come within the proscription of Section 8(b)(7)(C). Moreover, the conclusion that the picketing was legal activity is strengthened by the proviso to Section 8(b)(7)(C) since the legend used was pointed at an employer who failed to apply a union contract.

[Recommended Order omitted from publication.]

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